

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Jackson May 6, 2008

MICHAEL WHITE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Marshall County
No. 17493 Lee Russell, Judge

No. M2007-02157-CCA-R3-PC - Filed September 8, 2008

The petitioner, Michael White, appeals from the Marshall County Circuit Court's dismissal of his petition for post-conviction relief, which he had filed in 2007 to challenge his 2005 jury convictions of five counts of rape. On appeal, the petitioner claims that his trial counsel rendered ineffective assistance by inadequately investigating the case, failing to communicate with the petitioner, and failing to effectively cross-examine witnesses. Because the record supports the post-conviction court's determinations, we affirm the dismissal of post-conviction relief.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES, J., and DAVID G. HAYES, SR. J., joined.

Jheri Beth Rich, Lewisburg, Tennessee, for the appellant, Michael White.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Marshall County Circuit Court convicted the defendant of five counts of rape and, on April 26, 2005, imposed an effective sentence of 55 years in the Department of Correction. The court of criminal appeals affirmed the conviction judgments, and the supreme court denied permission to appeal. *See State v. Michael White*, No. M2005-01659-CCA-R3-CD (Tenn. Crim. App., Nashville, July 13, 2006), *perm. app. denied* (Tenn. 2006).

This court's opinion in *Michael White* reveals that the single victim, the defendant's stepdaughter, who was 13 and later 14 years old at the time of the 2003-04 assaults, testified to specific instances when the defendant removed her shorts or panties and penetrated her with his penis. *Michael White*, slip op. at 1-4. She admitted during her testimony that, just prior to telling

her peers about the abuse, she had become angry with the defendant, who had caught her sneaking a boy out of her room and had “grounded” her. *Id.*, slip op. at 4. The investigating Tennessee Bureau of Investigation agent testified that he interviewed the defendant and that the defendant denied any improper contact with the victim. *Id.*, slip op. at 5. A pediatric nurse who examined the victim testified that, unlike the findings on a 1999 examination of the victim, the victim in 2004 had sustained “a tear at the base of [her] hymen, which indicated that there had been some type of penetrating injury to that part of [her] body.” *Id.*, slip op. at 7. Further, at trial, the petitioner testified that he had “grounded” the victim and her sister for sneaking boys into the house. *Id.*, slip op. at 8. The petitioner described his relationship with the victim and her sister as typical of “any father with their kids.” *Id.* The petitioner denied that anything improper occurred between him and the victim. *Id.*

The post-conviction court conducted an evidentiary hearing on September 10, 2007. In the hearing, the petitioner’s general sessions court counsel testified that he did not recall whether a preliminary hearing was held in the petitioner’s case, but he detailed the pre-hearing interviews he would have conducted with the assistant district attorney general and the police officers if a hearing was to be held. He testified that, if no preliminary hearing were held, the decision to waive the hearing would have been the petitioner’s. Counsel interviewed the petitioner prior to seeking a bond reduction. Counsel testified that he typically used a preliminary hearing “as a discovery tool so that we can make a motion to suppress later on at the Circuit level.” To this end, counsel’s usual practice in advance of preliminary hearings was to “do a factual investigation” and not so much to perform legal research. On cross-examination, counsel confirmed that the warrant in the petitioner’s case showed that a preliminary hearing was held in the petitioner’s case.

The petitioner’s trial counsel in circuit court testified that, prior to trial, he met with the petitioner two or three times at the jail. Each meeting lasted “at least an hour.” Counsel testified that he interviewed the investigating officers and reviewed the preliminary hearing transcript. Although the petitioner had given a pretrial statement, counsel did not move to suppress the statement because, in the statement, the petitioner denied “doing anything wrong.” Additionally, counsel perceived no legal basis for suppression of the statement.

Counsel recalled performing no legal research on the case, but he testified that, immediately prior to trial, he worked on the file four or five hours, spent “another hour or two speaking with [the petitioner],” and spent another one to two hours talking with his office’s investigators. Counsel testified that he had handled 20 to 25 rape cases prior to the petitioner’s.

Counsel testified that, when he began representing the petitioner, he conferred with the attorney who represented the petitioner in general sessions court. Counsel testified that he sought and obtained discovery materials and a bill of particulars and that he utilized investigators. He testified that he explored possible reasons the minor victim would have had to fabricate accusations against the petitioner. Counsel recalled that he and the petitioner agreed that the petitioner should testify in his own defense.

Counsel testified that the evidence presented by the State at trial evinced no surprises. In particular, the victim testified consistently with her pretrial statement, of which counsel was informed prior to trial. Counsel opined that, in a sex offense case involving a child victim, “we can probably get better information through the police officer that took the statement” than from interviewing the victim.

Counsel testified that he did not use the defendant’s wife and the victim’s sister as witnesses at trial because allegations had arisen that these persons had attempted to “bribe” the victim into “chang[ing] her story” by promising her a “puppy.” Counsel testified that he decided prior to trial that calling the wife and sister would be damaging to the defense. Counsel informed the petitioner of counsel’s decision not to call these persons as witnesses.

To prepare for the sentencing hearing, counsel reviewed the presentence report and gave the petitioner a copy. Upon counsel’s advice, with which the petitioner agreed, the petitioner did not testify in the sentencing hearing. Counsel testified that the decision not to have the petitioner testify in the sentencing hearing was driven by the petitioner’s persistence in the claim that he was innocent.

The petitioner testified in the post-conviction evidentiary hearing that his counsel in general sessions court did not meet with him prior to the preliminary hearing. The petitioner testified that, following his indictment, his trial counsel initially met with him during his “[o]nce a month” court appearances. He recalled that, eventually, counsel met with him in the jail “maybe twice, three times” for periods of “no more than 10, 15 minutes” each.

The petitioner testified that he asked counsel to call as witnesses at trial the petitioner’s sister, his wife, his wife’s sister, and the victim’s sister. He denied that counsel explained to him why these persons should not be used as witnesses. The petitioner testified that these four persons were present at trial and that he assumed counsel would call them to testify.

The petitioner testified that counsel failed to introduce into evidence letters that the victim had written to the petitioner. The petitioner claimed that he was insufficiently informed to testify at trial and that counsel pressured him into testifying. He testified that counsel failed to adequately impeach the victim through the use of her inconsistent statements. The petitioner testified that because some of the counts in the indictment were duplicitous, some of his convictions violated principles of double jeopardy.

On cross-examination, the petitioner acknowledged that he received and read a copy of “discovery” but denied that he received a copy of the State’s response to a motion for a bill of particulars. The petitioner testified that, just prior to trial, counsel told him, “I just got started on this about a week ago.” The petitioner said that when the trial began, he did not know what the State’s witnesses would say, other “than saying I did it.” He testified that he and his counsel “[n]ever talked about [his] testimony.” He said that counsel only told him that the “jury want[ed] to hear from [him].” He admitted that counsel “didn’t twist [his] arm to testify.” Although counsel did not

explain that the petitioner had the right to choose whether to testify, the trial judge imparted this information to him.

Fred Holloway, an investigator with the public defender's office, testified that he interviewed the victim, the victim's sister, and the defendant's wife. Mr. Holloway testified that he interviewed the defendant's sister because the defendant had suggested that she could be a trial witness. Mr. Holloway said he tried to find the boys who had been accused of sneaking into the defendant's house but was unable to do so. He testified that he learned nothing from the interviews that could be helpful to the defense, except that the boys' sneaking into the house could possibly serve as a basis for the victim's fabricating the claims against the defendant. In Mr. Holloway's experience, the defendant's trial counsel typically was thorough in discussing clients' cases with them.

Following the evidentiary hearing, the post-conviction court entered extensive and thorough findings of fact and conclusions of law that culminated in the denial of post-conviction relief. The post-conviction court found that the trial "turned essentially on which of two witnesses the jury believed. The young victim, stepdaughter of the [petitioner], testified for hours and gave detailed descriptions of the rapes." The post-conviction court stated that, although the victim's testimony was marked by her becoming "physically sick from the emotional strain," the defendant's testimony was "salesmanlike," employing a manner "totally inconsistent with the demeanor of someone falsely accused of raping his young stepchild on Easter Sunday morning." For the sake of efficiency, we will discuss later in this opinion the post-conviction court's findings relative to the specific appellate claims of ineffective assistance of counsel.

The petitioner bears the burden of proving the allegations in his post-conviction petition by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). On appeal, the findings of fact made by the trial court are conclusive and will not be disturbed unless the evidence contained in the record preponderates against them. *Brooks v. State*, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). The error must be so serious as to render an unreliable result. *Id.* at 687. It is not necessary, however, that absent the deficiency, the trial would have resulted in an acquittal. *Id.* at 695. Should the petitioner fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to

deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court's factual findings, our review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001); *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

The petitioner's first claim of ineffective assistance of counsel is that his counsel investigated the case deficiently by failing to interview "the two boys" who had sneaked into the victim's house through a window. The post-conviction court stated that "we can only speculate as to what [the boys] might have said." The court pointed out that "[t]he mere fact that boys had been barred from the parties' home because of prior clandestine visits there would not itself establish that the victim lied on the stand as revenge for an occasion of step-parent discipline." Moreover, the post-conviction court noted that the victim's trial testimony, though countered by "skillful[] cross-examination," was marked by "convincing detail" and contained "absolutely nothing . . . to suggest a malicious motive for her accusations."

In short, the post-conviction court held that the petitioner had failed to establish that he had been prejudiced by counsel's not having found or utilized the trespassing boys. We agree. "When a [post-conviction] petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). If he fails to do so, he generally fails to establish ineffective assistance of counsel. *Id.* The post-conviction court may not speculate "on the question of . . . what a witness's testimony might have been if introduced" at trial. *Id.*; *see also Wade v. State*, 914 S.W.2d 97, 102 (Tenn. Crim. App. 1995).

The petitioner's next claim is that his trial counsel inadequately communicated with him before trial. In his brief, the petitioner particularizes this claim by saying only that "counsel spent only a nominal amount of time communicating with [the petitioner] prior to trial." The post-

conviction court found that trial counsel, whom the court described as a “veteran” criminal defense trial attorney, “spent numerous hours with the [petitioner], both in meetings at the Marshall County Jail and at the courthouse.” The court obviously accredited counsel’s testimony, which was at odds on this point with that of the petitioner. Based upon counsel’s testimony, the record supports the post-conviction court’s determination that counsel did not perform deficiently in meeting or communicating with the petitioner.

Finally, the petitioner asserts that his trial counsel inadequately cross-examined the victim at trial. He claims that counsel should have questioned the victim about “prior molestation” and that counsel’s cross-examination of the victim was “not as an advocate.” The post-conviction court, however, found that trial counsel “skillfully cross-examined” the victim. The court also opined that the victim presented “internally consistent and detailed” testimony that ultimately was effective, and in its peroration, the court recognized that “no basis [existed] to conclude that it is reasonably probable that a change in any such strategic choice would have altered the results of the trial.”

We conclude that, on the basis of the record before us, the defendant has failed to show by clear and convincing evidence that he was prejudiced by his counsel’s method of cross-examining the victim at trial. Although credibility was a prime factor in the petitioner’s trial, he called upon the post-conviction court – and now calls upon the appellate court – to speculate what questions could have been posed on cross-examination, how the victim would have responded, and what effect the response would have had upon the victim’s otherwise solid, apparently powerful testimony. We also recognize that the post-conviction court found that the petitioner’s “salesmanlike” trial testimony tended to bolster the relative credibility of the victim.

Accordingly, in conclusion, we hold that the petitioner failed to establish his claim of ineffective assistance of counsel, and we affirm the order denying relief.

JAMES CURWOOD WITT, JR., JUDGE